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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 340.

ROY E. BLACK, G. HERBERT FEIK, EDGAR M. FLEWELLYN, ROBERT E. KEMP, EVERETT D. MILBURN, SR., WILLIAM K. STROBEL and ELMER V. YOUNG, *Petitioners*,

v.

THE ROLAND ELECTRICAL COMPANY, A corporation, *Respondent*.

On Petition for Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Maryland is reported as *Roy E. Black, et al.* v. *Roland Electrical Company*, 68 Fed. Supp. 117. The opinion rendered August 12, 1947, in the case by the United States Circuit Court of Appeals for the Fourth Circuit as *Roland Electrical Company* v. *Black et al.*, is in the record (R. 69, 84) but had not been printed in the reports at the time this brief was prepared.

STATEMENT OF THE CASE.

This suit was instituted March 13, 1945, by the petitioners, seven of the employees of the Roland Electrical Company, and was pending on January 28, 1946, when this Court filed its opinion in *Roland Electrical Company* v. *Walling*, 326 U. S. 657, 678, affirming the holding of the court below that the employees of this respondent were engaged in the production of goods for commerce within the terms of the Fair Labor Standards Act, hereinafter referred to as FLSA.

The suit in the District Court of these petitioners was held in abeyance from March 13, 1945, until shortly after January 28, 1946, when it came on for trial. By answer filed the respondent interposed three separate and distinct defenses to claims of the petitioners set forth in their joint complaint. (R. 10, 14.)

One defense was that any and all parts of their respective claims which accrued more than three years prior to the filing of the suit on March 13, 1945, were barred by the three-year Maryland Statute of Limitations.

Another defense was that the aggregate of the sums paid by the respondent to the respective petitioners, during the period in which their claims were not barred, as wages and as year-end bonuses[1], exceeded the amounts claimed by them under the terms of FLSA.

The third defense was that the respondent had paid to the respective defendants overtime in certain weeks for work before regular working hours or after regular working hours or for Saturday afternoons, when such defendants did not work an aggregate of 40 hours during such

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[1] The year-end bonuses were paid in the sole discretion of the management of the electrical company, without any prior agreement, and were computed on 5% of the aggregate wages received by the respective employees for the preceding 11 months of the calendar year, less deductions from the bonuses for Social Security and Withholding taxes of the employee. (R. 15, 16)

weeks[2], and that the respondent was entitled to credit for any overpayments, measured by FLSA standards in any week against short or under-payments in any subsequent week.

The petitioners presented at the trial no records as to the time each claimed to have worked or as to the amount claimed. The records of the respondent were accepted and used without question as to their correctness with respect to the time worked and the payments made. Stipulations were entered into between counsel as to the amounts due, computed in accordance with FLSA, in event decision was adverse to the respondent and as the court below remarked, "The plaintiffs expressly waive any claim to a greater sum." (R. 73.)

The District Court, whose prior decision had been reversed that the employees of respondent were not within the terms of FLSA, ruled against the respondent on all three defenses raised in the answer to the complaint, though it did not see fit to notice in its opinion the matter of the Statute of Limitations. The Circuit Court of Appeals affirmed the District Court in denying the credits claimed by the respondent for the bonuses and over-payments, but reversed the District Court as to its holding that all parts of the claims which accrued more than three years prior to the filing of the suit were barred by the three year Maryland Statute of Limitations.

This petition has been filed by the seven employees for a writ of certiorari to the United States Circuit Court of

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[2] As this Court noted in *Roland Electrical Company* v. *Walling*, 326 U. S. 657, 678, a part of the service rendered by the electrical company to some of its customers consisted in repairing of electrical appliances, etc., in the shops, etc., of such customers. These services were rendered when requested, either day or night. If an employee had to render such services either before or after the regular working hours, the electrical company followed the practice of paying such employee time and one-half for all such hours worked before or after regular working hours regardless of whether such employee worked 40 hours in any week in which such payments were made. (R. 17, 18)

Appeals for the Fourth Circuit to review the opinion and judgment holding that the three year, and not the 12 year Maryland Statute of Limitations applies in this case.

STATUTES INVOLVED.

Article 57, Section 1, Code of Public General Laws of Maryland (Flack's Ed. 1939):

> "All actions of account, actions of assumpsit, or on the case, except as hereinafter provided, actions of debt on simple contract, detinue or replevin, all actions of trespass for injuries to real or personal property, all actions for illegal arrest, false imprisonment, or violation of the twenty-third, twenty-sixth, thirty-first and thirty-second articles of the declaration of rights, or any of them, or of the existing, or any future provisions of the code touching the writ of habeas corpus, or proceedings thereunder, and all actions, whether of debt, ejectment or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for ninety-nine years renewable forever, or for a greater or lesser period, and all distraints issued to recover such rent shall be commenced, sued or issued within three years from the time the cause of action accrued; and all actions on the case for libel and slander and all actions of assault, battery and wounding, or any of them, within one year from the time the cause of action accrued; this section not to apply to such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants who are not residents within this State."

Article 57, Section 3, Code of Public General Laws of Maryland (Flack's Ed. 1939):

> "No bill, testamentary, administration or other bond (except sheriffs and constables' bonds), judgment, recognizance, statute merchant, or of the staple or other specialty whatsoever, except such as shall be taken for the use of the State, shall be good and pleadable, or admitted in evidence against any person in this State after the principal debtor and creditor have been both

dead twelve years, or the debt or thing in action is above twelve years' standing; provided, however, that every payment of interest upon any single bill or other specialty shall suspend the operation of this section as to such bill or specialty for three years after the date of such payment; saving to all persons who shall be under the aforementioned impediments of infancy or insanity of mind the full benefit of all such bills, bonds, judgments, recognizances, statute merchant, or of the staple or other specialties, for the period of six years after the removal of such disability."

POINTS RELIED UPON.

I.

There is neither equity nor a matter of public importance involved in this case.

II.

The United States Circuit Court of Appeals for the Fourth Circuit properly disregarded the nisi prius court decision in the Manhoff case.

III.

The Portal-To-Portal Act of 1947 (Public Law 49, 80th Congress) has established the rule for all cases arising thereafter.

ARGUMENT.

I.

There is neither equity nor a matter of public importance involved in this case.

There is not here any question of substandard wages having been paid by the respondent to the petitioners. As shown by the record in the case, the respondent at all times paid basic rates of wages considerably in excess of the FLSA minimum rates of wages.

The issue here arises solely because of overtime for work in excess of the FLSA standard of 40 hours a week whilst the respondent, because of the nature of its service establishment, had a workweek of 44 hours—eight hours from Monday to Friday, inclusive, and 4 hours on Saturday.

As shown by the stipulated computations in the record, the respondent paid to each and every one of the petitioners more money in the aggregate than such employees are entitled to receive under the terms of FLSA, that is, with the unquestionable basic straight time rate paid in excess of the minimum FLSA rates for straight time of 40 hours a week and with such basic rate plus one-half thereof for all hours worked in excess of 40 hours a week.

No equity arises in such a case simply because the year-end bonuses and the overtime paid when none was in fact earned were not set apart and tagged as being for overtime compensation under the FLSA. Respondent firmly believed, and continued to believe until this Court held to the contrary, that its employees were not engaged in the production of goods for commerce, and thus were not under the FLSA. Yet respondent was more liberal in making payments to its employees than it would have been had the payments been made in exact compliance with the FLSA.

Also, the petitioners do not show any conflict between the court below and any other United States Circuit Court of Appeals, or with this Court as to the merits of the claims of petitioners. So far as counsel for the respondent know, there are no such conflicts.

There is thus no matter of public importance involved which would justify this Court in allowing the writ and reviewing the correctness of the action taken by the court below.

II.

The United States Circuit Court of Appeals for the Fourth Circuit properly disregarded the nisi prius court decision in the Manhoff case.

The Manhoff case was one in which there was involved in the Baltimore City Court a question under FLSA whether the three year or the 12 year Statute of Limitations of the State of Maryland applied. Judge Frank of that court held that the 12 year Maryland Statute of Limitations applied. Judge Soper, who wrote the unanimous opinion of the Circuit Court of Appeals in this case, was formerly a member of the Supreme Bench of Baltimore City and a Judge of the Baltimore City Court. He stated in the opinion with respect to the Manhoff case that:

> "A decision directly applicable, contrary to the one we have reached, was rendered in *Manhoff* v. *Thomsen-Ellis-Hutton Co.*, 6 Labor Cases, 61,498, by Judge Eli Frank, an able and experienced member of the Supreme Bench of [fol. 80] Baltimore City, a court of *nisi prius* jurisdiction; but after careful consideration, we have reached the conclusion that it is not in accord with the rules announced in related cases by the Court of Appeals of Maryland, in the highest court of the state. Judge Frank's decision, while entitled to great respect, would not be binding on other trial courts of the state and under the rulings of the Supreme Court is not binding upon us. *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *West* v. *A. T. & T. Co.*, 311 U. S. 223; *Six Companies of California* v. *Joint Highway District*, 311 U. S. 180; *The Order of Commercial Travelers of America* v. *King*, 4 Cir. 161 F. 2d 108." (R. 77.)

The policy announced in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, was applied in each of the cases cited in the above quoted extract from the opinion below. In all of those cases, the State courts involved appear to have been intermediate appellate courts and there were no convincing reasons supporting any substantial belief that the highest

courts of the respective states would have decided the particular questions of State law any differently than the respective intermediate courts had decided them.

The Manhoff case was decided by an "inferior court," a *nisi prius* court, whose opinions are not binding on any other court in the State of Maryland. Not being binding in Maryland, it would seem obvious that they should not be considered binding on the Federal courts.

Counsel for the petitioners has argued (p. 31) that the court below adopted its own "Rule of decision" but we believe that the opinion of the court below very clearly shows that said court did not attempt to determine for itself the question of the interpretation and effect of the Statutes of Limitations of Maryland. On the contrary, the court below examined all of the evidence as to the Maryland law on limitations. It made a searching and exhaustive examination of the statutes involved, as well as the applicable decided cases in the highest court of that State.

The issue in the Manhoff case in the Baltimore City Court and in the court below is quite simple, namely, whether the 3 year Statute of Limitations contained in the hereinbefore quoted Article 57, Section 1 of the Code of Public General Laws of Maryland, or whether the 12 year Statute of Limitations, applicable to specialties, contained in Section 3 of the same Article applies to a suit for additional wages under the FLSA. Admittedly, that precise question has not been determined by the highest court of Maryland. There are no intermediate appellate courts in that State.

The Baltimore City Court concluded in the Manhoff case that the 12 year Statute of Limitations applied, while the court below disagreed therewith and concluded that the 3 year Statute of Limitations applied for reasons which are fully, and we believe correctly, stated in the opinion.

We think it obvious that whatever right, in law or equity, which the petitioners have to recover from the respondent additional compensation, is not based on a specialty but is

based on the facts applied to the standard stated in the law. The right in no sense partakes of the certainty of a specialty. This is made self-evident by the bitterly contested case of *Roland Electrical Company* v. *Walling, supra,* decided by this Court, and by the contest in the District Court and in the court below in this particular case. This results because the terms of the agreement of employment, the character of work performed, the straight time rates of wages, the number of hours each petitioner worked each week, the amounts of compensation paid each employee weekly, etc., are all questions of fact to be established, as facts are established in any law suit not based on a specialty.

III.

The Portal-To-Portal Act of 1947 amending the Fair Labor Standards Act and prescribing not to exceed a 2 year period of limitations for all causes of action accruing after the approval of the said Portal-To-Portal Act not only renders the contentions of the petitioners relatively unimportant but establishes the incongruity of such contentions.

Part IV, Section 6(a) of the Portal-to-Portal Act of 1947 prescribes limitations of not exceeding 2 years for all causes of action accruing after the date of enactment of said act. Section 6(b) provides that:

> "if the cause of action accrued prior to the date of the enactment of this act—[suit] may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c), every action shall be forever barred unless commenced within the shorter of such two periods;" (word in brackets supplied).

Section 6(c) provides, in effect, that if the cause of action accrued prior to the enactment of the Portal-to-Portal Act and was not then barred by an applicable State statute

of limitations, suit thereon should not be barred by Section 6(c), if commenced within 120 days after the enactment of said Portal-to-Portal Act.

This statute became law after the judgment was entered in the District Court but while the appeal was pending in the court below. A Statute of Limitations is jurisdictional and applies to all causes, whether or not pending in court on the date of the enactment thereof. See *Bell* v. *Morrison*, 1 Peters, 351; *Brent* v. *Bank of Washington*, 10 Peters, 596; *Burnet* v. *Desmornes*, 226 U. S. 145; *Vance* v. *Vance*, 108 U. S. 514, *Mitchel* v. *Clark*, 110 U. S. 663; *In re McClure*, 21 Fed. (2d) 538.

The court below stated in a footnote to its opinion that:

> "The limitation provisions of the Portal-to-Portal Act of 1947, Part 4, Sec. 6 are likewise inapplicable here, since they were limited to actions *commenced* on or after the date of the enactment of the statute." (R. 76) (Italics supplied).

But regardless of the correctness of the conclusion, in effect, of the court below that the Portal-to-Portal Act of 1947 made a distinction between causes of action pending in court under the Fair Labor Standards Act and causes of action which had accrued or might thereafter accrue and suit be commenced thereon, the fact remains that the Congress has seen fit to declare in a statute that suit must be commenced on such causes of action within whichever is the shorter of two periods, namely (1) two years, or (2) as permitted under applicable State statute of limitations, subject to the grace period in Section 6(c) of the Act.

The fact that this statute was enacted demonstrates that it was and is the belief of the Congress that the period of limitations for suits under FLSA should not exceed 2 years and could be less if the respective States should so provide. Also, the fact of this statute renders relatively unimportant the public interest in the issue raised by the petitioners that the applicable State of Maryland statute of limitations permits suits under FLSA within 12 years from the date

the cause of action accrued, rather than within 3 years, as held by the court below.

We think, too, that in the face of this statute, it is incongruous of the petitioners to submit a labored argument to this Court that it should now grant certiorari and reverse the court below because it did not apply the 12 year Maryland Statute of Limitations in this suit for recovery of additional wages.

CONCLUSION.

It is the position of the respondent that the petition for a writ of certiorari is without merit and should be denied.

Respectfully submitted,

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